

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

STATE OF MISSOURI, ex rel.)	
JEREMIAH W. (JAY) NIXON,)	
Attorney General,)	
)	
Plaintiff,)	
)	
v.)	Case No.
)	
CONTEST AMERICA PUBLISHERS,)	
INC., a for profit Nevada corporation;)	
d/b/a OPPORTUNITIES UNLIMITED)	
PUBLICATIONS, INC., a for profit)	
Missouri corporation; NORTH)	
AMERICAN AWARD CENTER, INC.,)	
)	
)	
Defendants.)	

**PETITION FOR PERMANENT INJUNCTION,
RESTITUTION, CIVIL PENALTIES AND OTHER RELIEF**

COMES NOW Plaintiff, State of Missouri, at the relation of its Attorney General, Jeremiah W. ("Jay") Nixon, and his assistant, Anne E. Schneider, and brings this action under the Merchandising Practices Act, and, in support hereof, states and alleges as follows:

I. PARTIES

1. Jeremiah W. ("Jay") Nixon is the duly elected, qualified and acting Attorney General of the State of Missouri, and Anne E. Schneider is a duly appointed Assistant Attorney General.

2. Defendant Contest America Publishers, Inc. ("CAP") is a for-profit Nevada corporation based in North Kansas City, Missouri. CAP's principal place of business is located at

1401 Armour Road, North Kansas City, Missouri 64116. CAP is engaged in the business of conducting skill contests through the mail. CAP solicits through multiple mailings to consumers in Arizona and throughout the country.

3. Defendant Opportunities Unlimited, Inc. (“OUI”) is a for-profit Missouri corporation based in North Kansas City, Missouri. OUI’s principal place of business is located at 1401 Armour Road, North Kansas City, Missouri 64116. OUI is engaged in the business of conducting skill contests through the mail. OUI solicits through multiple mailings to consumers in Arizona and throughout the country. OUI operates a separate series of skill contest under the name North American Award Center (“NAAC”).

4. Whenever in this Complaint reference is made to any act of Defendants, such reference shall be deemed to mean the personal acts of the Defendants or acts of the Defendants’ officers, shareholders, directors, employees, agents, or other representatives, acting within the scope of their employment or authority.

II. JURISDICTION AND VENUE

5. Pursuant to Chapter 407, Missouri’s Merchandising Practices Act, specifically Section 407.020 and 407.100, the Attorney General may institute actions to prosecute unlawful trade practices which violate the Merchandising Practices Act, Chapter 407.

6. Jurisdiction is conferred upon this Court by Section 407.100 of the Merchandising Practices Act, and venue is proper in that the Defendants have sent their advertisements and related communications and have engaged in the sale of merchandise to persons residing in Missouri and throughout the country so that violations of the Merchandising Practices Act have occurred in

Jackson County.

7. Section 407.020, RSMo 1994, provides as follows:

- (1) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in § 407.452, in or from the State of Missouri, is declared to be an unlawful practice....

8. Pursuant to the authority granted by § 407.145, RSMo, the Attorney General has promulgated rules explaining and defining terms used in § 407.020, RSMo, of the Merchandising Practices Act. Such Rules include the following:

A. 15 CSR 60-7.020 provides:

- (1) A seller shall not make a representation or statement of fact in an advertisement that is false or has the capacity to mislead prospective purchasers.

B. 15 CSR 60-8.020 provides that:

- (1) An unfair practice is any practice which -

(A) Either -

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes substantial injury to consumers.

- (2) Proof of deception, fraud, or misrepresentation is not required to prove unfair practices as used in section 407.020.1, RSMo.

C. 15 CSR 60-8.040 provides that:

- (1) It is an unfair practice for any person in connection with the advertisement or sale of

merchandise to violate the duty of good faith in solicitation, negotiation and performance, or in any manner fail to act in good faith

D. 15 CSR 60-8.080 provides that:

(1) It is an unfair practice for any person in connection with the sale of merchandise to engage in any unconscionable act or practice, or to use any unconscionable contract or contract term.

(2) It is unconscionable to take advantage of an unequal bargaining position and obtain a contract or term which results in a gross disparity of values exchanged

E. 15 CSR 60-8.090 provides that:

(1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to engage in any method, use or practice which -

(A) Violates state or federal law intended to protect the public; and

(B) Presents a risk of, or causes substantial injury to consumers.

F. 15 CSR 60-8.010 provides that:

(1) Unless inconsistent with the definitions provided in Chapter 407, RSMo, the following terms and phrases shall mean:

(B) Consumer shall include any person (as defined in section 407.010.5, RSMo) who purchases, may purchase or is solicited for purchase of merchandise;

(E) Good faith shall mean honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade;

G. 15 CSR 60-9.020 provides that:

(1) Deception is any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression.

(2) Reliance, actual deception, knowledge of deception, intent to mislead or deceive, or any other culpable mental state such as recklessness or negligence, are not elements of deception as used in section 407.020.1, RSMo. Deception may occur in securing the first contact with a consumer and is not cured even though the true facts or nature of the advertisement or offer for sale or subsequently disclosed.

H. 15 CSR 60-9.030 provides that:

(1) It is deception for any person in an advertisement or sales presentation to use any format which because of its overall appearance has the tendency or capacity to mislead consumers.

I. 15 CSR 60-9.040 provides that:

(1) Fraud includes any acts, omissions or artifices which involve falsehood, deception, trickery, breach of legal or equitable duty, trust, or confidence, and are injurious to another or by which an undue or unconscientious advantage over another is obtained.

(2) Fraud, as used in section 407.020.1, RSMo, is not limited to common law fraud or deceit and is not limited to finite rules, but extends to the infinite variations of human invention.

J. 15 CSR 60-9.050 provides that:

(1) False pretense is any use of trick or deception, forgery, or false and fraudulent representation, statement, pretense, instrument or device with the intent to defraud.

(2) Reliance and injury are not elements of false pretense as used in section 407.020.1, RSMo.

K. 15 CSR 60-9.060 provides that:

(1) False promise is any statement or representation which is false or misleading as to the maker's intention or ability to perform a promise, or likelihood the promise will be performed.

(2) Reliance and injury are not elements of false promise as used in section 407.030.1, RSMo.

L. 15 CSR 60-9.070 provides that:

(1) A misrepresentation is an assertion that is not in accord with the facts....

(2) Reliance, knowledge that the assertion is false or misleading, intent to defraud, intent that the consumer rely upon the assertion, or any other culpable mental state such as recklessness or negligence, are not elements of misrepresentation as used in section 407.020.1, RSMo.

M. 15 CSR 60-9.080 provides that:

(1) It is a misrepresentation for any person in connection with the advertisement or sale of merchandise to make an untrue statement of material fact.

N. 15 CSR 60-9.090 provides that:

(1) It is a misrepresentation for any person in connection with the advertisement or sale of merchandise to omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they are made, not misleading.

O. 15 CSR 60-9.100 provides that:

(1) It is a misrepresentation for any person in connection with the advertisement or sale of merchandise to make any fraudulent assertion.

(2) An assertion is fraudulent if the person intends his/her assertions to induce a consumer to purchase merchandise, and the person -

(A) Knows or believes that the assertion is not in accord with the facts; or

(B) Knows that he does not have a reasonable basis for his/her assertion....

P. 15 CSR 60-9-110 provides that:

(1) Concealment of a material fact is any method, act, use or practice which operates to hide or keep material facts from consumers.

(2) Suppression of a material fact is any method, act, use or practice which is likely to curtail or reduce the ability of consumers to take notice of material facts which are stated.

(3) Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her.

(4) Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1, RSMo.

Q. 15 CSR 60-9.010 provides that:

(1) Unless inconsistent with the definitions provided in Chapter 407, RSMo, the following terms and phrases shall mean:

(A) Assertion may be words, conduct or pictorial depiction, and may convey past or

present fact, law, value, opinion, intention or other state of mind;

(B) Consumer shall include any person . . . who purchases, may purchase or is solicited for purchase of merchandise; and

(C) Material fact is any fact which a reasonable consumer would likely consider to be important in making a purchasing decision, or which would be likely to induce a person to manifest his/her assent, or which the seller knows would be likely to induce a particular consumer to manifest his/her assent, or which would be likely to induce a reasonable consumer to act, respond or change his/her behavior in any substantial manner.

9. Section 407.100, RSMo, 2000, provides:

- (1) Whenever it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitation, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.
- (2) In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds for accounts if the court finds that funds or property may be hidden or removed from this state or that such orders or injunctions are otherwise necessary.
- (3) If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice, or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to unlawful by this chapter.
- (4) The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including, but not limited to any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice, or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured.
- (5) The court, in its discretion, may appoint a receiver to insure the conformance to any

orders issued under subsection 3 of this section or to insure the payment of any damages ordered under subsection 4 of this section.

- (6) The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.
- (7) Any action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.
- (8) The attorney general is authorized to enter into consent judgments or consent injunctions with or without admissions of violations of this chapter. Violation of any such consent judgment or consent injunction shall be treated as a violation under section 407.110.

- 10. Section 407.130, RSMo 1994, provides:

In any action brought under the provisions of section 407.100, the attorney general is entitled to recover as costs, in addition to normal court costs, the costs of the investigation and prosecution of any action to enforce the provisions of this chapter.

- 11. Section 407.010(4), RSMo 2000, defines "merchandise" as any objects, wares, goods,

commodities, intangibles, real estate or services.

- 12. Pursuant to Section 407.010, the judging services and other services related to the conducting of the skill contests offered for sale by Defendants constitute merchandise.

Venue

- 13. Section 407.100, RSMo, 2000, provides:

Any action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.

14. Pursuant to Section 407.100 RSMo, jurisdiction and venue lie in the Circuit Court of Boone County based on Defendants' having engaged in business in such county.

III. FACTUAL BACKGROUND

A. DEFENDANTS' BUSINESS

15. Defendants promote, sell participations in, and conduct skill contests throughout the United States. Defendants contact potential customers by mail with invitations to enter the contests and solicitations to pay judging and entry fees.

16. Defendants' solicitations include personalized form letters to consumers implying that they have won, or are likely to win, major prizes or that by responding to the solicitations they will receive, or are likely to receive, cash and other prizes.

17. These initial solicitations generally offer an "entry level" contest which consists of a very simple puzzle or question to be answered. Completion of this Defendants lead consumers to believe that the correct completion of this initial puzzle will entitle a consumer to the offered prize. In fact, a correct entry in this first round is necessary for a consumer to advance in the contest.

18. The second, third, and subsequent rounds (called "tiebreakers" by Defendants) are more difficult than the entry round. Successful completion of each of those rounds is necessary for advancement to the final round. The final round (or "tiebreaker") is substantially more difficult than any preceding contest round. Defendant's skill contests typically include four or five rounds, including the initial entry.

19. In each round, the participants are required to correctly complete math and/or word puzzles or answer questions in order to advance to the next round.

If more than one participant obtains the highest score in the final round, Defendants divide the prize (typically between \$5,000 and \$21,000) among those with the highest score.

20. Defendants charge a fee for participation in their contests in the entry round. Defendants charge additional fees for the subsequent “tiebreaker” rounds. The fees range from approximately \$1.00 to more than \$15.00.

21. Defendants often send multiple entries for the same contest round to a participant, urging participants to enter more than once. Accordingly, a single consumer may receive multiple entry invitations, and thus may compete multiple times (have multiple “plays”) in a single contest, provided participation fees are paid.

22. Defendants also offer opportunities to play for additional prizes (typically an additional sum of money) in the same contest. These added prizes are referred to as “bonuses,” and their ultimate awarding depends on whether the consumer wins the underlying contest. To compete for these added sums of money, the Consumer is required to pay an additional fee. Entry fees for bonus prizes cost up to \$25.00. Consumers competing in a single contest through multiple entries may also, for the requisite fees, compete for these bonuses in each play.

23. Defendants offer multiple contests of this nature on a continuing basis. At any one time there may be as many as ten contests in progress, each of which may include numerous bonus contests.

24. Defendants misrepresent, directly and by implication, the nature of the contest as being a contest of chance, rather than based on skill, the prerequisites to winning a prize, and the degree of skill necessary to successfully compete for a prize. Such misrepresentations include, but

are not limited to, the use of words or phrases that create the impression prizes will be awarded on the basis of chance or luck, that the correct completion of the initial puzzle contained within the contest entry solicitation will entitle the consumer to the prizes offered, and that a contest will not be difficult for the recipient of the solicitations to compete in and win, when, in fact, the particular recipient may lack the degree of skill required to compete effectively.

25. Defendants omit or suppress material facts about their contests of skill, including but not limited to the following:

- a. the actual nature of the contest offered, which is a game of skill and not chance;
- b. the level of difficulty or extent of skill required to compete in and win the contest and all or part of the prize offered;
- c. the likelihood that up to four (4) rounds of puzzles must be completed in order to win any of the prizes offered;
- d. the likelihood that the contest offering the prizes will take up to eighteen (18) months to complete;
- e. the fact that some or all of the rounds of puzzles offered will consist of more than one part, each part of which requiring correct completion of a puzzle in order to be eligible to win, or continue to compete for, the prize initially described;
- f. the fact that during the contest additional bonus prizes will be offered consisting of additional puzzles for additional judging fees, receipt of which is wholly dependent on winning the underlying puzzle contests.

g. the complexity of the process of competing effectively in the contests offered;

h. the potential cost of competing in the contest, including the multiple rounds of puzzles and the additional bonus contests offered.

i. the fact that the advertised prize may be split among a number of winners in the event of a tie, resulting in smaller individual prize awards;

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests this Court, pursuant to the Merchandising Practices Act, and upon consideration of the facts set forth in this Petition, to issue the following orders after a hearing can be held on this matter:

A. A permanent injunction pursuant to Section 407.100 RSMo prohibiting and enjoining Defendants and any other individuals acting on their behalf or at their direction or any other persons having actual notice of this order from engaging in the use or employment of any of the unlawful practices described in this Petition.

B. An order of this Court rescinding all sales and requiring Defendants, jointly and severally, to make restitution, in accordance with Section 407.100 RSMo, to restore to those persons who have suffered an ascertainable loss by the unlawful methods, practices or acts of the Defendants all monies received by Defendants.

C. An order of this Court requiring Defendants, jointly and severally, to pay an additional amount ordered by this Court to the Merchandising Practices Revolving Fund in accordance with § 407.140, RSMo.

D. An order of this Court requiring Defendants, jointly and severally, to pay to Plaintiff a sum equal to the cost of the investigation and prosecution of this action in accordance with Section 407.130, RSMo.

E. An order of this Court awarding to the State of Missouri civil penalties of One Thousand Dollars (\$1,000.00) for each and every violation of Section 407.020 RSMo., as evidenced by each and every solicitation sent by Defendants to a Missouri consumer.

G. Any other relief deemed by the Court to be just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Anne E. Schneider
Missouri Bar No. 35479
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102
(573) 751-8455

ATTORNEYS FOR PLAINTIFF.